

Religion's Legal Place in the Schoolhouse

A conservative advocacy group urges close adherence to federal law on student expression and curricular content

BY COLBY M. MAY

Among the many issues that public school leaders and teachers often deal with is the proper role of religious belief and practice within their schools.

The law regarding how the First Amendment of the U.S. Constitution applies to the public school context can often seem complex and confusing, with some cases holding that a school improperly endorsed a religious viewpoint and others stating that a school improperly censored religious expression occurring on campus.

As an attorney with a conservative organization that works to protect religious and constitutional freedoms, I often am asked to address some of the most common questions and misconceptions regarding religious expression in the public schools. While we are involved in various school-related situations, one general theme seems to arise regularly — the vital distinction between student religious expression on campus and school officials' endorsement of a religious viewpoint.

Keeping this division in mind while addressing particular issues involving religion should help public school leaders, teachers, parents and even students to make sense of this area of law.

Constitutional Backing

The First Amendment provides the

backdrop for the relationship between religious practice and government conduct. As part of the Bill of Rights, it was designed to ensure that the government would not infringe upon certain inalienable rights of private citizens.

Over the years, the U.S. Supreme Court has emphasized how to properly navigate the intersection of the Establishment, Free Exercise and Free Speech clauses of the First Amendment by noting in the landmark 1990 case of *Westside Community Board of Education v. Mergens*, "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise clauses protect."

The Supreme Court has held that the First Amendment applies to all federal, state and local government actors, including public schools and their employees. In a landmark 1969 case, *Tinker v. Des Moines Independent School District*, the court noted: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

This is why the term "separation of

church and state"— which appears nowhere in the Constitution — is a misleading description of what the First Amendment requires. The First Amendment's protection of the religious expression of private individuals, including public school students, neither permits nor requires public school officials to make their schools "religion-free" zones.

In the public school context, the First Amendment dictates official school policies that implicate religion are treated differently than student religious expression. In other words, a school's obligation to ensure it does not violate the Establishment Clause does not affect its independent obligation to uphold the free speech rights of students with regard to religious or other expression.

On the one hand, the ability of public school teachers to speak freely in the classroom is somewhat limited because public school officials can ensure teachers do not violate the Establishment Clause by endorsing a particular religious viewpoint or requiring students to participate in religious activities.

The religious expression of students is private expression fully protected by the First Amendment. A public school may regulate the content of speech when the student's expression is actually sponsored or encouraged by the school. *Santa Fe Independent School District v. Doe* in

2000 held that school-sponsored prayer at high school football games violated the First Amendment even though it was delivered by a student representing the student body.

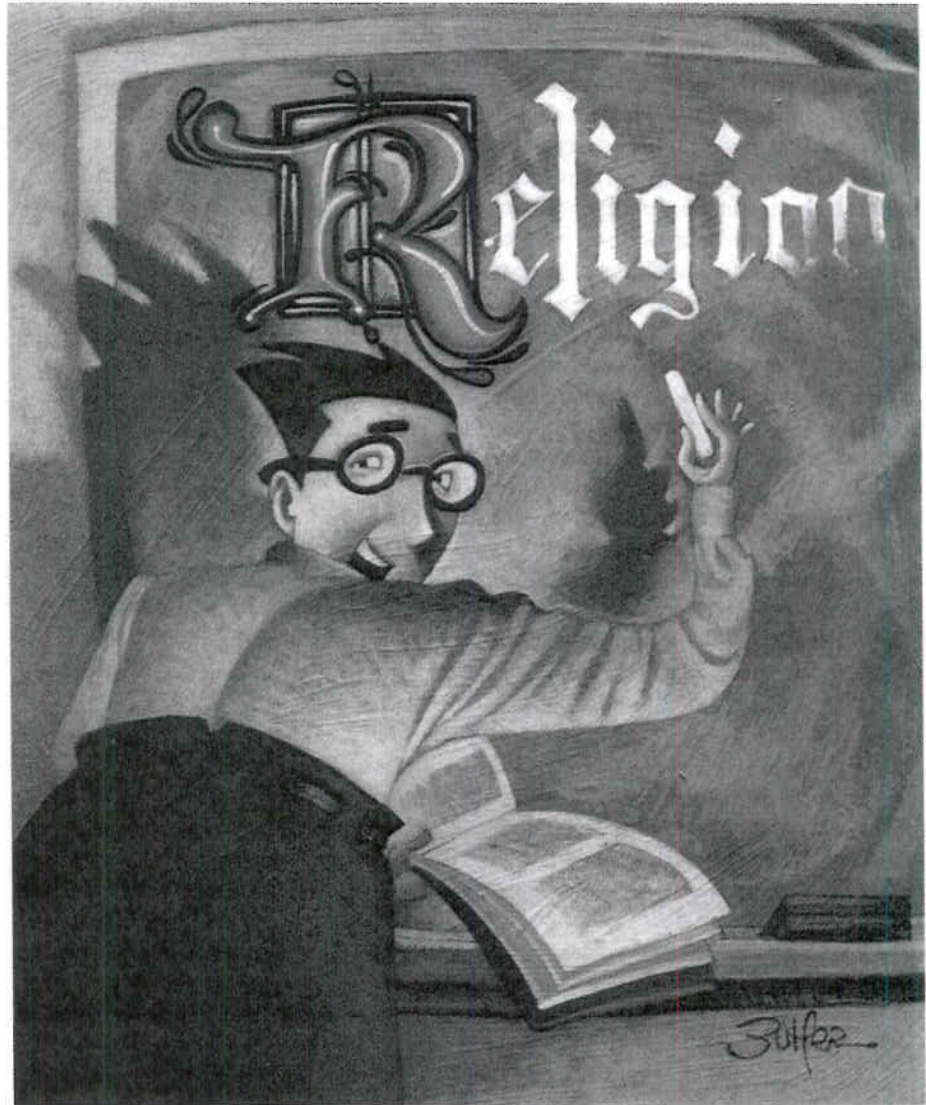
As noted in *Tinker*, school officials also can regulate speech when the expression causes an actual disruption in the school's operation, according to the *Tinker* case. So long as students conduct themselves in a non-harassing and non-disruptive manner, public schools *must* allow students to express their religious views on the same terms as they allow other forms of expression.

What's Permissible?

An issue public school administrators and teachers often confront is the appropriate role that religion may play during instructional time in the classroom. There is a key difference between "religious activity" or "religious instruction" in the classroom — that is between instructing students that the tenets of one religion are true and should be followed, which is *not* permitted, and teaching about religion, such as what members of various religions believe, which is permitted.

The U.S. Department of Education explains it this way in its 2003 guidelines, *Religious Expression in Public Schools*: "Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the Establishment Clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging anti-religious activity."

While the guidelines forbid public school teachers from engaging in religious activity in the classroom, they affirm the Establishment Clause does not mean that religion is strictly forbidden from public schools in all aspects. In *Stone v. Graham* in 1980, the Supreme Court stated that the matter before it was "not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."



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In other words, the Bible, Koran and other religious texts may be studied or otherwise used in public schools for their literary, poetic or historical aspects, but schools cannot teach that the religious tenets of these texts are true or false. In this regard, the guidelines state: "Public schools may not provide religious

instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture) as literature and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature and social studies."

Additionally, a federal court ruled in a 2000 case involving a Michigan charter school that teachers may address religious issues in more detail in response to student questions. The bottom line is that religious beliefs and practices may be discussed in the classroom in an academic, non-devotional manner.

Theory of Evolution

The issue of what should be taught in

public school science classes considering the origins of life and who should make that decision has again become prominent in the public eye. Although a strong majority of Americans have consistently supported the teaching of the strengths and weaknesses of Darwinian evolutionary theory, as well as its limitations, a Pennsylvania district court last December struck down a public school's requirement that a disclaimer be read in all biology classes before the theory of evolution is discussed.

While some observers proclaimed that this decision means that Darwinian theory now must be placed upon an untouchable pedestal in American science classrooms — regardless of any opposing view held by individual science teachers, parents and state and local school boards — that is simply not the case.

Many school leaders would be surprised to learn that the Supreme Court said the following about evolutionary theory in *Edwards v. Aguillard* in 1987: "We do not imply that a legislature could never require that scientific cri-



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tiques of prevailing scientific theories be taught. . . . [T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science

instruction."

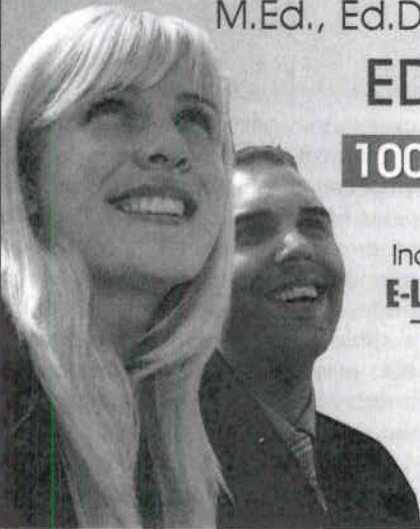
In other words, the intent of educators is all-important in considering whether a particular decision relating to evolutionary theory will be upheld by the courts. While the Supreme Court held that a school may teach "a variety of scientific theories about the origins of humankind" if it has the "clear secular intent of enhancing the effectiveness of science instruction," schools may not alter the content of classroom instruction solely for the purpose of supporting or harming a particular religious view. An alleged religious motivation was the primary problem in the Pennsylvania court case.

As confirmed by the federal circuit courts covering California and Illinois, when a teacher's own interpretation of the scientific evidence on this issue conflicts with the official position of the school, the school retains the authority to require that the curriculum is followed. Moreover, a teacher's "incidental references to God and creationism" in response to student questions do not create a constitutional crisis. As a federal district court ruled in 2000 in *Daugherty v. Vanguard Charter School Academy*, the discussion of alternatives to evolution are not prohibited in a public school class.

Religious Expression

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the right to discuss religious issues with classmates and to distribute literature, both religious and non-religious, on campus. Student speech is generally considered to be private expression and may only be attributed to the school in rare circumstances. Thus the Establishment Clause does not apply to student expression, and a school cannot prohibit a student from distributing religious literature without violating the First Amendment.

As the Supreme Court stated in the *Mergens* case, such expression is considered "private speech endorsing religion, which the Free Speech and Free Exercise clauses protect."

The right of students to "evangelize" on campus by sharing their religious views with their classmates is also fully protected. This includes the ability of students to wear clothing conveying a religious message, although special considerations come into play when a school dress code is involved.

Additionally, students have the right to pray individually or collectively on campus. The Supreme Court has acknowledged, in *Santa Fe Independent School District v. Doe*, that "nothing in the Constitution ... prohibits any public school student from voluntarily praying at any time before, during, or after the school day." Student prayer and other acts of worship during after-school Bible club meetings, such as "See You at the Pole" events during non-instructional times, are constitutionally protected.

Like any right, the ability of students to express their views on campus is subject to reasonable restrictions. Schools may certainly limit the distribution of all forms of literature, including religious literature, to non-instructional times such as before and after classes and during lunch and study hall. They also may prevent students from harassing others who do not want to hear their message and from actually disrupting the operation of the school.

However, it is important to note that regulations of student expression must be content-neutral (except for vulgarity, profanity and the like), and student religious expression cannot be treated differently from other forms of speech. Likewise, while school officials may prohibit expression that actually "materially disrupts classwork or involves substan-

tial disorder or invasion of rights of others," according to the *Tinker* case, they certainly cannot characterize all religious speech as inherently disruptive. The basic rule is that student religious speech

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and activity must be treated the same as student non-religious speech and activity.

Religion's Place

The First Amendment's application to religious expression in public schools is not as baffling as it may seem at first glance. The Establishment Clause prevents all governmental actors, including public school officials and teachers, from requir-

ing the participation of citizens (including students) in a religious exercise.

On the other hand, the Free Speech and Free Exercise clauses protect religious and other expression from government intrusion. The key First Amendment principle applicable to public schools is that the Establishment Clause does not require the suppression of student religious expression. In fact, censorship of this nature would itself violate the Free Speech and Establishment clauses. Keeping this principle in mind should aid school leaders in keeping within the requirements of the law.

The tension within the First Amendment between free speech and religious free exercise, versus freedom from religious establishment, is a dynamic area of the law. As such, there are frustrations aplenty for all who work in this area. Public schools are on the front line of that frustration. ■

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